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IN THE

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

AGAINST

Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,
Respondents.

October Term, 1927.
No. 141.

BRIEF FOR PETITIONER.

This case comes before the Court upon writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, granted December 13, 1926.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 15 Fed. [2d], 137.

The District Court rendered no opinion, but made an order which appears at pages 31 32 of the Record.

Jurisdiction of the Court.

This Court has jurisdiction of the above entitled case under United States Code, Title 28, Chapter 9, § 347 (former Judicial Code, § 240).

The order to be reviewed is dated September 25, 1926 (R. p. 50). It dismissed and discharged a rule to show cause why a writ of mandamus should not issue to the United States District Court for the District of New Jersey and Honorable John Rellstab, Judge of said Court, and thereby refused to interfere with the order of the District Court setting aside the verdict and judgment rendered thereon in the District Court in favor of the petitioner on June 21, 1923, and granting a new trial in said cause.

The grounds on which the jurisdiction of this Court is invoked are that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decisions of this Court and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

Statement of the Case.

On December 9, 1920, David Ginsberg, individually, and as next friend of Harry Ginsberg, and as Administrator *ad prosequendum* of the Estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey against The Delaware, Lackawanna and Western Railroad Company to recover damages for personal injuries alleged to have been sustained by David and Harry Ginsberg, and the pecuniary loss alleged to have been suffered on account of the death of George Ginsberg. Such damages and such pecuniary loss were alleged to have resulted from the negligence of the railroad company in propelling a locomotive against the Ginsbergs while they in an automobile were passing over the tracks of the railroad at a highway crossing.

On account of the diversity of citizenship of the parties, the case was removed from the State Court to the United States District Court for the District of New Jersey, where issue was subsequently joined and the case duly noticed for trial.

The trial of the cause, completed on December 2, 1920, at the September term of the District Court, resulted in a verdict in favor of all the plaintiffs. On motion of defendant the verdict was set aside by the trial Court and a new trial granted to the railroad company on proof of subornation of perjury by plaintiff, David Ginsberg, in procuring the false testimony of two of his witnesses at the trial, named Addie Ridner and William Ridner, respectively.

Subsequently said cause was again tried, and on March 3, 1923, at the January Term of the District Court, the jury rendered a verdict for the defendant Railroad Company, a new trial in which matter was denied by the trial judge, who is one of the respondents in this proceeding, and a rule for final judgment with costs was entered in the District Court on June 21, 1923 (R. p. 31).

The plaintiff, David Ginsberg, subsequently took a writ of error to the Circuit Court of Appeals for the Third Circuit.

On March 21, 1924, the mandate of that Court, affirming the judgment of the District Court in favor of the petitioner Railroad Company, was filed in the District Court (R. p. 31).

At no time during the term at which the judgment final in favor of the petitioner Railroad Company was rendered in the District Court was there any order of the said District Court extending said term, nor did the respective parties to said action stipulate or file any stipulations in the District Court extending the term in which said judgment final was rendered; neither did the District Court, after the mandate of the Circuit Court of Appeals for the Third Circuit was filed on March 21, 1924, extend said term, nor did the attorneys for the respective parties, by stipulation, extend the term in which the mandate from the Circuit Court of Appeals for the Third Circuit was filed, with the District Court, and the term in which the mandate from the Circuit Court of Appeals for the Third Circuit came down and was entered in the District Court likewise expired without an extension of said term (R. p. 31).

On the second trial of the cause, which resulted in a verdict for the petitioner Railroad Company, the petitioner, instead of the Ginsbergs, produced the witnesses Ridner and, although the plaintiffs and their attorneys were well aware of the fact that the said Ridners had given false testimony on the first trial, when they appeared as witnesses for the plaintiffs, which was contradictory to the testimony given by said witnesses on behalf of the petitioner on the second trial of said cause, neither the plaintiffs nor their attorneys sought to impeach the veracity or credibility of said witnesses on the second trial, although opportunity so to do was accorded them.

On March 30, 1925, more than one year after the mandate of the Circuit Court of Appeals was entered in the District Court the plaintiff Ginsberg sought to impeach the verdict in favor of the petitioner by filing with the Clerk of the District Court two affidavits, one by the witness, William Ridner, purporting to show that said witness testified on the second trial of said cause falsely for the petitioner, and another affidavit by Ridner's son, Seth, in which he endeavored to show that the accident to the plaintiff was caused in a manner to fix liability upon the Railroad Company.

After taking testimony in open court before the respondent, the Honorable John Rellstab, the Court granted to Ginsberg a new trial, to the prejudice of the petitioner Railroad Company.

Exhibit "A" in the transcript of the record of the Circuit Court of Appeals for the Third Circuit accompanying the petition (R. p. 1), is the docket entries of the District Court concerning the case involved. An examination of it shows that the terms of said Court in which said cause was pending were never extended after final judgment was rendered on June 21, 1923, nor during the term in which the mandate of the Circuit Court of Appeals for the Third Circuit, affirming the judgment in favor of the petitioner Railroad Company was filed in the District Court, these facts being undisputed.

On July 13, 1925, the Circuit Court of Appeals for the Third Circuit allowed the petitioner a rule to show cause why a mandamus should not issue to the respondents, the United States District Court for the District of New Jersey and the Honorable John Rellstab, Judge of said District Court, directing the respondents to reinstate the judgment so set aside.

Argument was had on said rule to show cause in the Circuit Court of Appeals for the Third Circuit on December 4, 1925, and on September 25, 1926, the Court filed its opinion (R. p. 45), dismissing and discharging the petitioner Railroad Company's application for a mandamus on the ground it had no power to issue said writ, although it was undisputed and was so found by the Circuit Court of Appeals that at the time the District Court set aside said judgment the respondent, the Honorable John Rellstab, assumed to act in the premises at a time after the expiration of the Term in which final judgment had been rendered, which Term had in no way or manner been extended (R. p. 47).

On December 6, 1926, petitioner presented its petition to this Court for a writ of certiorari to review said decision and order of the Circuit Court of Appeals. At the same time petitioner applied to this Court for leave to file a petition for a writ of mandamus directed to the United States District Court for the District of New Jersey and Honorable John Rellstab, Judge of said Court, commanding them to set aside the order of May 9, 1925.

On December 13, 1926, this Court granted said petition for writ of certiorari (R. p. 52), and at the same time denied the petitioner's application for leave to file a petition for mandamus.

Points Upon which Petitioner Intends to Reply.

Petitioner urges that the Circuit Court of Appeals erred in refusing to consider the merits of the cause, and in affirming the order of the court below; in effect dismissing the petitioner's application to it for a writ of mandamus directed to the District Court and to the Judge thereof, upon the sole ground that it had no power to issue the writ, and that said action was erroneous because:

(I) The District Court and its presiding Judge had no authority or power to set aside the final judgment entered upon the verdict in favor of the petitioner more than four terms after said final judgment was entered, no order having been made by the District Court or any of its Judges extending the term in which said final judgment was entered and no stipulations entered into or filed by the respective parties to the litigation, extending the term in which said final judgment was rendered;

(II) Mandamus was the appropriate remedy to correct the action of the District Court and its presiding Judge in exceeding their power and authority;

(III) The Circuit Court of Appeals had appellate jurisdiction to issue a mandamus to the District Court, because the lower Court's action was an interference with its mandate.

POINT I.

The District Court and its presiding Judge had no authority or power to set aside the final judgment entered upon the verdict in favor of the petitioner more than four terms after said final judgment was entered, no order having been made by the District Court or any of its Judges extending the term in which said final judgment was entered and no stipulations entered into or filed by the respective parties to the litigation, extending the term in which said final judgment was rendered.

Proof is presented by the petition (R. p. 1, *et seq.*, R. p. 3) that the term at which the judgment final in favor of the petitioner was entered on June 21, 1923, had expired, and that it was not continued or extended by any order of the Court or stipulation between the parties, and that the action of the respondent Judge in setting aside said judgment final in favor of petitioner by his order of April 28, 1925 (R. p. 32) was at least four terms after the expiration of the term in which said final judgment was entered.

The Circuit Court of Appeals found that the terms of court were not extended (R. p. 47).

That the action of the respondent Judge was in excess of his authority, and that the District Court had no longer any jurisdiction of the cause, is settled beyond question by the decisions of your Honorable Court from the case of *Cameron* v. *McRoberts* (3 Wheaton, 591), where this Court, in its certificate to the Circuit Court for the District of Kentucky, advised the lower Court in this language (p. 593):

> "That in this case the court had not the power over its decree so as to set the same aside on motion after the expiration of the term in which it was rendered,"

down through a long line of decisions to the present day. The opinion of Mr. Justice Miller in *Bronson* v. *Schulten* (104 U. S. 410) sets forth the law so fully as to warrant quotation (p. 415):

> "In this country, all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record and they may then be set aside, vacated, modified or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them, and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered and this is placed upon the ground that the case has passed beyond the control of the court."

Particularly applicable is the case of *Phillips* v. *Negley* (117 U. S. 665). The question involved in that case was the authority of the Supreme Court of the District of Columbia to set aside a verdict and judgment and grant a new trial at a term subsequent to that in which the judgment was entered, but which term had not been extended by any order of the Court or otherwise. In that case, quoting from

Bronson v. *Schulten* (*supra*), Mr. Justice Matthews said (p. 674):

> "'The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered and this authority can neither be conferred upon, nor withheld from, the courts of the United States by the statutes of a state or the practice of its courts.'"

Continuing, the Court said (p. 674):

> "Although the opinion also shows that upon the facts of that case, the action of the Circuit Court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision of the case rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error—or for the purpose of correctiag the record according to the fact where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision without recapitulating previous cases in this court, in which the point has been noticed, for the purpose of showing their harmony. It is the uniform doctrine of this court. 'No principle is better settled,' it was said in *Sibbald* v. *United States*, 12 Pet. 488, 492, 'or of more universal application than that no court can reverse or annul its final decrees or judgments for errors of fact or law after the term in which they have been rendered, unless for clerical mistakes. *Cameron* v. *McRoberts*, 3 Wheaton, 591; *Bank of Kentucky* v. *Wistar*, 3 Pet. 431, or to reinstate a cause dismissed by mistake, *The Palmyra*, 12 Wheaton, 1, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing.'"

Concluding, the learned Justice said (p. 679):

> "We are therefore of the opinion that the Supreme Court of the District, both at special and general term, in entertaining and granting the motion to set aside the judgment in the present case committed error, * * *"

So settled appears the law laid down in *Bronson* v. *Schulten* (*supra*) that this Court, speaking through Mr. Justice Hughes in *In re Metropolitan Trust Company* (218 U. S. 312), referred to the cases hereinbefore cited, as follows (p. 320):

> "It is in this light that the subsequent proceedings in the Circuit Court must be examined. If that court had jurisdiction to vacate the decree of January 10, 1908, in favor of the Trust Company, it was by virtue of its own control over the decree and not by force of the mandate of the Appellate Court. Nor could the court exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered, for in this case, the term had ended before the motion was made. *Cameron* v. *M'Roberts*, 3 Wheaton, 591; *Sibbald* v. *U. S.*, 12 Pet. 488; *Bronson* v. *Schulten*, 104 U. S. 410-15; *Ayres* v. *Wiswal*, 112 U. S. 187-90; *Phillips* v. *Negley*, 117 U. S. 665, 674."

See also

> 11 *Rose's Notes*, U. S. Reports, 551, *et seq.*;
> *Wetmore* v. *Karrick*, 205 U. S. 141.

It undoubtedly will be insisted by counsel for the defendant that the District Court had an inherent power to vacate the judgment rendered in favor of the petitioner and set aside the verdict upon which the judgment was rendered, even after the term had expired, because the claimed fraud in the judgment vacated rested upon the perjured testimony of one of the witnesses for the prevailing party. But we find that the great weight of authority is against this contention and that the acts for which a court will, on account of fraud, annul a judgment between the same parties after the term is ended have relation to frauds extrinsic or collateral to the matter tried and not to a fraud in the matter upon which the judgment was rendered.

This precise doctrine was established in the case of *United States* v. *Throckmorton*, 98 U. S. 61, where after a review

of the authorities Mr. Justice Miller used this language (p. 68):

> "That the mischief of retrying every case in which a judgment or decree rendered on false testimony given by perjured witnesses or on contracts or documents whose genuineness or validity was in issue and which are afterwards ascertained to be forged or fraudulent would be greater by reason of the endless nature of the strife than any compensation arising from doing justice in individual cases."

Chief Justice Waite, in *Vance* v. *Burbank*, 101 U. S. 514, referring to the *Throckmorton* case (*supra*), said that the fraud in respect to which relief will be granted, where a judgment is sought to be set aside after the decision of a judicial tribunal, must be such as has been practiced upon the unsuccessful party and prevented him from exhibiting his case fully and that false testimony is not enough if the disputed matter has been actually presented to or considered by the appropriate tribunal as the record shows was done in the instant case (R. p. 4).

The well considered case of *Nelson* v. *Meehan*, 155 Fed. 1, marshals the opinions of this Court and the lower Federal tribunals. We venture a quotation from it (p. 11):

> "So if it is a fact that the term of court at which the decree was rendered had expired before the motion to vacate was filed, then the case is but one where the litigants have had their day in court and have been afforded full opportunity to try the merits of their controversy. They had had a fair trial. The defendants lost. They were given the right of appeal and availed themselves of it. Again they were unsuccessful and no fraud extrinsic or collateral to the matter tried being shown and no statutory ground for vacating the decree appearing, it will not do for them now to seek to retry the issues already passed upon. The litigation should end."

POINT II.

Mandamus was the appropriate remedy to correct the action of the District Court and its presiding Judge in exceeding their power and authority.

The remedial appropriateness of the writ of mandamus is conclusively established by the adjudicated cases, since Chief Justice Marshall, speaking for this Court, in *Ex Parte Crane* (5 Peters, 190), laid down the rule that the writ was one of the prerogative writs of this Court (p. 193):

> "The Judicial Act, sec. 13, enacts that the Supreme Court shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding offices under the authority of the United States."

This Court in *McClelland* vs. *Carland* (217 U. S. 268), said (p. 279):

> "Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in Section 716 of the Revised Statutes of the United States. This section we have already had occasion to quote, and when read in connection with Section 12 of the Court of Appeals Act, it gives to the Circuit Court of Appeals the authority, as this Court has, to issue writs of *scire facias* and all writs not specifically provided for by statute and necessary for the exercise of the Court's jurisdiction and agreeable to the usages and principles of law."

Section 12 of the Court of Appeals Act referred to in the *McClelland* case has been perpetuated in U. S. Code, Title 28, Chapter 10, Section 377 (former Judicial Code, Section 262). See *U. S.* vs. *Mayer*, 235 U. S., 55.

It has been long settled that mandamus is the appropriate remedy—a power conferred in virtue of the general superintendence of inferior federal tribunals. While it is conceded that a motion for a new trial rests in the discretion of the Judge of the inferior court, and that this Court will not control the exercise thereof, yet where he has no authority to act on the application, or has acted contrary to his authority, mandamus is the proper remedy.

> *Life and Fire Insurance Co. v. Wilson*, 8 Peters 291, at p. 293;
> *Ex Parte Bradley*, Wall. 364, 368;
> *In re Pollitz*, 206 U. S. 323, 331;
> *Ex Parte Nebraska*, 209 U. S. 436, 442.

In re Winn, 213 U. S. 458, Mr. Justice Moody, speaking for the Court, said (p. 468):

> "* * * where the record makes it clear as a matter of law that this Circuit * * *" [*sic* District] "Court was without jurisdiction to take any action whatever * * * the writ of mandamus lies."

This was reiterated in *In re Metropolitan Trust Co.*, 218 U. S. 312, where Mr. Justice Hughes said (p. 321):

> "The question is not with respect to the mere form of the application which was made to the Circuit" [*sic* District] "Court for the purpose of setting the decree aside. When the motion was made the Court was without jurisdiction to vacate the decree. As the Court in granting the motion exceeded its power, mandamus is the appropriate remedy."

POINT III.

The Circuit Court of Appeals had appellate jurisdiction to issue a mandamus to the District Court, because the lower Court's action was an interference with its mandate.

The Circuit Court of Appeals denied the petitioner Railroad Company's application for the mandamus because of its conclusion that it had no power to issue the writ, it saying (R. p 48):

> "When the judgment was set aside, nothing was pending in this Court or the District Court. The Term in which the final judgment had been entered in the District Court, as above stated, had long since expired without any extension of any kind. If we dismiss the order, the case may possibly reach this Court again, but if the judgment is reinstated, the judgment will remain final in that Court and will never come into this Court. The reinstatement of the judgment, therefore, can not be in aid of the jurisdiction of this Court. Accordingly, we have no power to issue the writ."

From the reasoning of the Circuit Court of Appeals, it appears that it lost sight of the fact that the judgment which the District Court disturbed was its own judgment, and not that primarily of the Court below, because the Circuit Court of Appeals affirmed the judgment in favor of the petitioner, their decision thereon being reported in 296 Federal Reporter, 439, and thereafter issued its mandate that its said judgment be carried out, which mandate was filed in the District Court on March 21, 1924 (R. p. 11).

Southard et al v. *Russell* (16 Howard, 547) is authority for the contention that such was the status of the judgment entered in the District Court. There this Court said (p. 570):

> "* * * the decree sought to be set aside by this bill of review in the Court below was entered in pursuance of an

appeal in the original suit. It is, therefore, the decree of this Court, and not that primarily entered by the Court below, that is sought to be interfered with."

Any interference by the District Court with the judgment of the Circuit Court of Appeals, either by way of rule to show cause for the granting of a new trial, rehearing or review, was only permissible after the proper application had been made to and allowed by the Circuit Court of Appeals, for, your Honorable Court has said, *In re Potts* (166 U. S. 263, at pp. 265-6):

> "The general rules which govern cases of this kind are stated and the decisions by which those rules have been established are collected in the recent case of *Sanford Fork and Tool Company*, petitioner, 160 U. S. 247, in which this Court said:
>
> 'When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the decree as well as the law of the case and must carry it into execution according to the mandate. That court can not vary it or examine it for any other proofs for execution or give any other or further relief or review it, even for apparent error in matter decided upon appeal or intermeddle with it, other than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues a decree of this Court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal, if involving a sufficient amount, or by a writ of mandamus to execute the mandate of this Court; but the Circuit Court may consider and decide any matters left open by the mandate of this Court and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this Court at the time of rendering this decree may be consulted to ascertain what was intended by its mandate, and, either upon an application for a writ of mandamus or upon a new appeal, it is for this Court to construe its own mandate and act accordingly.'"
>
> * * * * * *

"When the merits of a case have been once decided by this Court upon appeal, the Circuit Court has no authority, without express leave of this Court, to grant a new trial, a rehearing or a review, or to permit new defenses or the merits to be introduced to unsettle any of the answer * * * * In this respect a motion for a new trial or petition for a rehearing stands upon the same ground as a bill of review * * * * (p. 367)

See also case further cited by this Court in Whitford vs. Clarke (212 U. S. 284, p. 290).

"It is further objected that the Circuit Court of Appeals had no jurisdiction to issue the writ of mandamus as that writ can only be issued in aid of the appellate jurisdiction of the Circuit Court of Appeals, and it is contended, as that Court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed.

"Section 22 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in Section 716 of the Revised Statutes of the United States. This section we have already had occasion to quote, and when read in connection with Section 22 of the Court of Appeals Act, it gives to the Circuit Court of Appeals the authority, in this Court has, to issue writs of error before and at which are specifically provided for by statute and necessary for the exercise of the Court's jurisdiction and agreeable to the usages and principles of law.

"In this case it appears that the original action was brought in the Circuit Court of the United States (might have been taken on appeal to the Circuit Court of Appeals) the case involved over two thousand dollars in amount and was between citizens of different states. There are two existing decisions of the District Courts holding different views as to the right to have writ of error in any case involved in this case before the Appellate Court has actually obtained jurisdiction of the case. There are expressions in opinions of this Court to the effect that such writs issue in aid of a jurisdiction actually acquired, but we think the true rule that where a case is within the appellate jurisdiction of the higher

by the Circuit Court of Appeals in refusing to issue the writ of mandamus and in dismissing petitioner's application therefor.

It is further respectfully submitted that, for the reasons stated, the order of the Circuit Court of Appeals, Third Circuit, should be reversed and that the said Court should be instructed to issue a mandamus directing respondents to reinstate the judgment of the District Court entered in favor of petitioners on June 21, 1923.

FREDERIC B. SCOTT,
Counsel for Petitioner.